STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2002
v	No. 230439 Eaton Circuit Court
CRAIG WILLIE BATTISTE, Defendant-Appellant.	LC No. 00-020001-FC

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of: first-degree home invasion, MCL 750.110a(2); two counts of first-degree criminal sexual conduct involving a weapon, MCL 750.520b(1)(e); ten counts of first-degree criminal sexual conduct during the course of another felony, MCL 750.520b(1)(c); two counts of armed robbery, MCL 750.529; two counts of kidnapping, MCL 750.349; bank robbery, MCL 750.531; unlawfully driving away another's motor vehicle (UDAA), MCL 750.413; possession of a firearm during the commission of a felony, MCL 750.227b; and conspiracy to commit first-degree home invasion, armed robbery, kidnapping, and first-degree criminal sexual conduct, MCL 750.157a. The trial court sentenced defendant to concurrent prison terms of: 150 to 240 months for the home invasion conviction; 400 to 720 months for each criminal sexual conduct conviction; 300 to 480 months for each armed robbery conviction; 400 to 720 months for each kidnapping conviction; 225 to 480 months for the bank robbery conviction; 24 to 60 months for the UDAA conviction; 95 to 240 months for the conspiracy to commit home invasion conviction; 210 to 480 months for the conspiracy to commit armed robbery conviction; and 260 to 480 months each for the conspiracy to commit kidnapping and conspiracy to commit criminal sexual conduct convictions. Defendant also received two years' imprisonment for the felony-firearm conviction to be served before and consecutive to his other sentences. Defendant appeals as of right. We affirm.

This case arises from a crime spree that began in Mulliken and continued to Detroit, during the early morning hours of November 14, 1999. The prosecution presented evidence that defendant and two others entered a home, threatened a young woman with guns, and repeatedly raped her. The assailants also demanded money and other property from her father. The father

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

testified that during this ordeal he was bound and gagged with duct tape and left in his basement bedroom.[1] Thereafter, one of the assailants forced the young woman to drive him to a bank and withdraw money from an ATM machine. Upon returning to her home, the perpetrators, joined by a fourth person, forced the young woman into a sport utility vehicle and drove her to Detroit, repeatedly raping her on the way. When the assailants reached Detroit they rented a motel room and continued their campaign of sexual assault against the young woman. Later that morning, she was dropped off at a restaurant in Novi.

Antoine Wilkins testified that he participated in the criminal conduct at issue and that he was convicted for his criminal actions. Wilkins further admitted that he was testifying against defendant in exchange for the prosecutor's recommendation that Wilkins receive the recommended minimum sentence range within the sentencing guidelines. Wilkins' testimony substantially confirmed the female complainant's account of events.

Wilkins identified himself, defendant, David Nealy, and Patrick Lang as the four assailants. According to Wilkins, the group drove to East Lansing in defendant's Ford Expedition allegedly to attend a party. Wilkins testified that they stopped at a gas station on the way to East Lansing. While they were stopped, Wilkins claimed that defendant expressed a need to purchase more duct tape, but Patrick Lang replied that they already had enough tape. Wilkins stated that they were in the East Lansing area for approximately two hours before spotting the victim near a Quality Dairy. Upon seeing the victim, Wilkins alleged that defendant made the comment "[t]here's the one right there" and turned the car around. As they followed the victim's car, Wilkins overheard his companions discussing a desire to "hit a lick," which he understood to mean "[g]rab somebody." Wilkins testified that during this discussion he heard Patrick Lang state that he wanted to have sex with the victim.

I. Venue

Defendant initially argues on appeal that the trial court erred in denying his pretrial motion for a change of venue and his post-judgment motion for a new trial. Both of these motions were predicated on the existence of pretrial publicity. Specifically, defendant claims that he demonstrated an existing "strong community feeling" about the trial that mandated a change of venue. We disagree. A trial court's decision on a motion for change of venue will not be disturbed on appeal absent an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). Likewise, a trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648, n 27; 576 NW2d 129 (1998).

Criminal defendants are generally tried in the county where the charged offenses allegedly occurred. *Jendrzejewski*, *supra* at 499; MCL 600.8312. However, a trial court may order a change of venue when justice demands. *Jendrzejewski*, *supra* at 499-500; MCL 762.7. Justice requires a change of venue when the pretrial publicity is so ubiquitous and unrelenting

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[1] The father was eventually able to escape from his restraints and call the police from a neighbor's phone.

that the entire community must be presumed to have been prejudiced by it. *Jendrzejewski, supra* at 501. The Court in *Jendrzejewski* noted that:

> Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice. [*Id*. at 500-501.]

However, we note that a juror's exposure to media reports about the defendant and the alleged crime does not automatically establish that defendant was denied a fair trial. *Id*. at 502. Rather, a reviewing court must look at the circumstances surrounding the trial to determine if it was fair. *Id*. Due process only demands that jurors act with a "lack of partiality, not an empty mind." *Id.* at 519.

In this case, the trial court denied defendant's pretrial motion for change of venue but offered to reconsider the motion after the jury selection process. Defendant concedes that defense counsel did not renew the motion for change of venue, but ultimately expressed satisfaction with the jury as seated. Consequently, we find that defendant affirmatively waived any challenges to venue. *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000); *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000).[2]

II. Accomplices' Statements

Defendant next contends that the trial court erroneously admitted testimony concerning statements that were allegedly made by his co-defendants on the night in question. We disagree. The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Knapp,* 244 Mich App 361, 377; 624 NW2d 227 (2001). However, if the decision involves a question of law this Court will review the issue de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant specifically cites the following colloquy that occurred between the prosecutor and codefendant Wilkins. This discussion concerned the events that took place during the drive back to Detroit on the night in question.

> *Q*. Anybody saying anything about any of these things that are going on, the touching, the oral sex, having sex with her? Anybody saying anything in the car about those things?
>
> *A*. While [defendant] was having sex with her, *Dave [Nealy] was like I don't hear her moaning.*

[2] We also note that the defense did not exhaust its peremptory challenges. Failure to exhaust peremptory challenges generally forfeits jury-selection issues. *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998).

Q. Okay. Anybody else say anything?

A. No.

Q. Pat or [defendant] say anything to her?

A. I can't remember.

Q. Do you think if you looked at a statement that you made, that that might help you remember?

A. Yes.

* * *

Q. Have you finished reading?

A. Yeah.

Q. Does that refresh your memory as to anything that [defendant] or Pat might have said?

A. Yes.

Q. Okay. What do you remember them saying?

A. *Pat was like: Who got the biggest dick or who fucked her the best.* [Emphasis added.]

After Wilkins testified about codefendant Lang's comment, defense counsel objected on the grounds that the statements were hearsay, irrelevant, and extremely prejudicial. However, the trial court overruled defendant's objection and concluded that the testimony was not hearsay because it was being offered for something other than the truth of the matter asserted.

A. Hearsay

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). After reviewing the record, we find that the trial court did not abuse its discretion in admitting the challenged testimony. Wilkins did not relate any assertion on the part of defendant, or the other assailants, to prove the truth of the matter asserted. Rather, the testimony concerning codefendant Nealy's alleged statement that he could not hearing the victim moaning was an assertion concerning what the codefendant could hear. It was not offered to prove the truth of the matter asserted. Likewise, codefendant Lang's comments were also not offered to prove the truth of the matter asserted. It appears to this Court that the prosecutor was actually seeking to use these statements to prove an aggressive and conspiratorial mood amongst the

codefendants. Thus, the testimony was not inadmissible under the rules governing hearsay. MRE 801; MRE 802.[3]

B. Relevance and Unfair Prejudice

Because defendant's participation in criminal sexual conduct, kidnapping, and conspiracy was at the core of this action; evidence tending to show such participation was certainly relevant. MRE 401. We further note that all relevant evidence is "prejudicial" to some extent, but that it is only when the prejudice substantially outweighs the probative value of the proffered evidence that the evidence should be excluded. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, mod 450 Mich 1212; 539 NW2d 504 (1995). Such "'determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony' by the trial judge." *People v Bahoda*, 448 Mich 261, 291; quoting *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993). During the hearing on defendant's motion for a new trial, the trial court commented that there was an enormous amount of evidence showing defendant's guilt and that the probative value of the contested evidence was not outweighed by any prejudicial effect it may have had on the jury. We agree with the trial court's assessment.

C. Harmless Error

Nevertheless, any error in the admission of this evidence was harmless. A defendant pressing a preserved claim of nonconstitutional error bears the burden of proving that a miscarriage of justice occurred under a "more probable than not" standard. *Lukity, supra* at 495-496. In this case, the female complainant's testimony was sufficiently detailed and compelling as to render the challenged testimony from one of the assailants substantially cumulative. Absent the testimony in question, the possibility of a different result would have been remote.

III. Prosecutorial Misconduct

Defendant also claims that the trial court erred in denying his motion for a new trial on grounds of prosecutorial misconduct. Specifically, defendant asserts that the prosecution made improper remarks during closing arguments. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Because defendant failed to object to the prosecutor's comments at trial, our review is limited to plain error affecting his substantial rights. *Carines*, *supra*.

Defendant initially purports that the prosecutor falsely attributed a statement allegedly made by Patrick Lang to defendant. A review of the record supports defendant's contention. However, this error could easily have been cured with a timely objection and appropriate instruction; consequently, appellate relief is not warranted. See *People v Launsburry*, 217 Mich

[3] Even if the contested testimony could be regarded as covering out-of-court statements offered to prove the truth of the matters asserted, the testimony would have been admissible pursuant to MRE 801(d)(2)(E). See *People v Brake*, 208 Mich App 233, 242, n2; 527 NW2d 56 (1994).

App 358, 361; 551 NW2d 460 (1996). Given the overwhelming evidence of defendant's guilt, we find no error requiring reversal. *Carines, supra*.

Defendant's other allegation of prosecutorial misconduct arises from the prosecutor's remarks during closing arguments concerning defendant's responsibility for the sexual assaults committed by his codefendants, on an aiding-and-abetting theory:

> But it's way beyond that in terms of the other CSCs that [defendant] committed himself. Look at a couple of points. First of all, it defies common sense to believe that these guys followed [the principal complainant] all the way from East Lansing to Mulliken for the cash in her wallet and some used TVs and VCRs. It defies common sense that they followed this young woman with long blond hair all that way only intending to rob her. There were plenty of people in East Lansing to rob.
>
> Mr. Wilkins tells us that he saw the handgun in Pat's hand in Detroit; that before they even got to East Lansing, they stopped at a gas station, [defendant] wanted to buy some more duct tape, Mr. Lang thought they had enough, and he saw [the principal complainant] at the QD in East Lansing. [Defendant] said there goes some, there goes some. Pat Lang said let's go. And they turned around and followed her. And it was discussed that they were going to do a lick, slang for a robbery. But there was more. Pat Lang said I'm going to fuck her. Wilkins heard it, [defendant] heard it.

Defendant claims that the reference to the victim's blond hair was an improper appeal to racial prejudice. However, strong public policy against racial prejudice does not extend to forbidding a prosecutor from reminding a jury that the woman chosen for sexual exploitation was attractive in part by way of her blonde hair. It also does not appear that the prosecutor was attempting to appeal to racial prejudices.

Defendant also opines that the prosecution attempted to steer the jury away from the evidence by arguing "common sense." This argument is totally without merit. One of the great benefits of our jury system is that jurors are expected to rely on "common sense and everyday experience." CJI2d 2.6(2).

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Robert J. Danhof